neys may find other ways to earn their living, all to the very great advantage of the country. The victories of the carriers in court have been Pyrrhic victories, and their cost might far better have been used to pay shippers in full for losses suffered by the fault of the carrier. It is no hardship to require the carrier to pay insurance losses if he is allowed to charge proper prices for such insurance. His prices in the past have not been proper. The shipper has no case if, being offered insurance at proper prices, he consciously chooses to ship at his own risk. He has felt aggrieved, and will continue to do so if he is overcharged for insurance, or if he is not informed of the choice that is offered to him. The Second Cummins Act reasonably interpreted offers a sane and peaceful solution. E. C. G.

IMMUNITY OF STATE SHIPS ENGAGED IN COMMERCE.—The subject of the immunity which foreign sovereign states and the property of such states shall enjoy in our courts has always given judges a great deal of trouble. Although confronted with an almost hopeless confusion of opinion found in treatises on international law and decided cases, Judge Mack, in a recent case, *The Pesaro* (D. C., S. D., N. Y., Oct. 1, 1921, Supp. Op., Dec. 13, 1921), 277 Fed. 473, has probably made a creditable contribution to the solution of some of the difficulties. The steamship *Pesaro* was owned by the kingdom of Italy and manned by civilian officers and crew under the direction of the ministry for railway and maritime transportation. She was engaged in ordinary commercial trade carrying passengers and goods for hire, the vessel being in no way connected with the Italian navy. This action was a libel *in rem* against the ship to enforce a claim for damages to a cargo of olive oil shipped thereon. The case had already been to the Supreme Court (*The Pesaro,* 255 U. S. 216), where it was ruled that the Italian ambassador's direct suggestion that the ship was owned by the Italian government must be made through diplomatic channels of our government. Only one question remained for the district court to decide, and it was held that an ordinary merchant vessel owned, operated and in the possession of a foreign sovereign state and engaged in carrying passengers and cargo for hire is not immune from arrest on process from the admiralty courts of the United States, especially in view of the fact that a vessel of the United States in like circumstances would not be immune in the courts of that foreign state.

The leading English case dealing with this problem is *The Parlement Belge* (1880), 5 P. D. 197. The suit was *in rem* against an unarmed mail packet owned by Belgium and officered by officers of the royal Belgian navy, to recover for damages caused by collision. Besides carrying mail, the ship carried merchandise and passengers for hire. That a foreign sovereign could not be directly impleaded, in either private or official capacity, would seem clear. See *Mighell* v. *Sultan of Johore* [1894], 1 Q. B. 149; *Duke of Brunswick* v. *King of Hanover,* 6 Beav. 1; 2 H. L. 1. In the *Parlement*

Belge the court said: "The real principle on which the exemption of every sovereign from the jurisdiction of every court has been deduced is that the exercise of such jurisdiction would be incompatible with his regal dignity —that is to say, with his absolute independence of every superior authority." And in holding that the court had no jurisdiction, Brett, L. J., said, "* * * as a consequence of the absolute independence of every sovereign authority and of the international comity, * * * each and every one declines to exercise by means of any of its courts, any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to its public use." The vice inherent in the action *in rem* was that it impleaded the sovereign indirectly so as to "call upon him to sacrifice either his property or his independence." The court considered the *Exchange,* an American case, a good precedent. See also *The Jassy* (1906), P. 270.

Before dealing with the later English cases we shall consider the *Schooner Exchange* v. *M'Faddon* (1812), 7 Cr. 116. This was a libel brought by American citizens against the *Exchange,* an armed public vessel of France lying in the port of Philadelphia. It was claimed on behalf of the ship that the court had no jurisdiction to inquire into the title of an armed national vessel of a foreign sovereign. Chief Justice Marshall had no decided cases to look to. The writers on international law gave practically no aid. The court reasoned that the jurisdiction of each sovereign state was absolute within its own territory, but by keeping our ports open to the public ships of foreign friendly powers we gave an implied assent to immunity from arrest. Jurisdiction was denied.

Although usually citing the *Parlement Belge* as a precedent, the later English cases have gone far beyond that decision. In *The Porto Alexandre* [1920], P. 30, the facts were substantially like those in the *Pesaro.* The *Porto Alexandre,* a lawful prize of war, was used by Portugal for ordinary trading voyages, earning freight. While on a commercial voyage she went aground and was salvaged by tug-boats of the plaintiffs. In holding that she was immune from arrest for compensation for salvage, Scrutton, L. J., remarked, "* * * no one can shut his eyes, now that the fashion of nationalization is in the air, to the fact that many states are trading, or are about to trade, with ships belonging to themselves; and if these national ships wander about without liabilities, many trading affairs will become difficult; but it seems to me the remedy is not in these courts. The *Parlement Belge* excludes remedies in these courts." But it would seem that a real distinction lies in the fact that the *Parlement Belge* was serving a public purpose in carrying the mails, whereas the *Porto Alexandre* was a national ship on a purely commercial venture. The courts have sometimes expressed opinions to the effect that this may make a vital difference. These we shall now consider.

The Charkieh, L. R. 4 A. & E. 59, was decided before the *Parlement Belge.* The action was *in rem* against the ship for a tort (collision). The ship was owned by the Khedive of Egypt in the capacity of ruler, and was

engaged in a mere commercial venture. It was held that the court had jurisdiction. While the decision may be based upon the finding that the Khedive was not the ruler of a sovereign state, Sir Robert Phillimore believed the case could be decided on another ground. "I must say that if ever there was a case in which the alleged sovereign (to use the language of Bynkershoek) was 'strenue mercatorem agens,' or in which, as Lord Stowell says, he ought to 'traffick on the common principles that other traders traffick,' it is the present case." He believed that warships were immune because in a fair sense connected with the "jus coronae" of the foreign sovereign. In the *Prins Frederik* (1820), 2 Dod. 451, the action was *in rem* for the salvaging of an armed vessel of The Netherlands being used in time of peace for ordinary commerce. There was a compromise without adjudication of the jurisdictional question raised. The Advocate of the Admiralty who defended the ship pointed out that the civilians regarded immunity as extending only to things *"extra commercium,* and *quorum non est commercium,* and in a general enumeration are denominated *sacra, religiosa, publica—publicis usibus destinata,"* and that ships of war were therefore exempt. *The Comus* (1816), an unreported case referred to in the *Prinz Frederik,* had already decided that there was no action against a warship for salvage. In *The Swift* (1813), 1 Dod. 320, Sir William Scott intimated that if the sovereign's vessel was used for commercial purposes there should be no immunity. "Some sovereigns have a monopoly of certain commodities, in which they traffic on the common principle that other traders traffic; and if the King of England so possessed and so exercised any monopoly, I am not prepared to say that he must not conform his traffic to the general rules by which all trade is regulated." But it was held that there was no violation of the Navigation Act, so the action *in rem* against government-owned army food was dismissed. In a foot-note to the *Swift* there is a shorthand writer's account of *Foster* v. *Herries,* decided in the Court of Exch., 24th June, 1782. In that case the cargo and goods were condemned, but it is far from clear that the goods were the property of the crown.

However, if one suffers the loss of his own ship by reason of the tort of the commander of His Majesty's ship, the injured party is not without legal redress. In *The Mentor* (1799), 1 Rob. 179, the court said that an action will lie against the officer in immediate command of the offending ship, that person being the actual wrongdoer. *The Athol,* 1 W. Rob. Rep. 374, is to the same effect. Taking cognizance of the fact that the loss is usually great and the wrongdoer often impecunious, we may doubt the efficacy of this remedy. But the *Athol* assures us that this is certainly the correct one, for Dr. Lushington was able to "recollect a case where damages were recovered against an officer in command of one of Her Majesty's ships of war, who had unjustly seized a ship in time of peace, and the officer was obliged to fly the country."

The American decisions subsequent to the *Exchange* have followed a rather devious course. In *Briggs* v. *The Lightships,* 11 Allen 157, the peti-

tioner brought an action against three ships owned by the United States, claiming a lien for labor and materials furnished in their construction before they became government property. The ships were to be used by the government as floating lights in the Potomac. Jurisdiction was denied, the ground being the public nature of the service to be rendered. An earlier case, *The Revenue Cutter No. 1,* 21 Law Reporter 281 (armed patrol boats), took the opposite view, the court being of the opinion that the United States fared no better than an individual if owning property subject to a lien.

Where the property of a sovereign state is not also in its possession, our courts have often held that such property may be retained by the lienor, and it is not immune from arrest by process *in rem* to enforce a lien, even though it be destined for a public use. *U. S.* v. *Wilder,* 3 Sumner 308 (trover by U. S., failed); *The Davis,* 10 Wall. 15 (U. S. property in carrier's possession); *Long* v. *Tampico,* 16 Fed. 491 (Mexican public-owned ships being delivered to that government); *The Johnson Lighterage Co. No. 24* (1916), 231 Fed. 365 (Russian munitions of war in carrier's possession arrested by process *in rem*). In *U. S.* v. *Wilder, supra,* Story expressed the view that since a sovereign state could not be directly impleaded there was good reason for holding that action *in rem* be permitted, and by allowing this remedy (with exceptions where instruments of war were involved), "the public policy will be promoted, and not impugned."

The English courts have held that ships which are not the property of a foreign sovereign state, but are chartered or requisitioned by it, or otherwise in its occupation, may not be arrested by process of the admiralty court; but proceedings *in personam* against the owner of the ship, and proceedings *in rem* are unaffected, and a maritime lien or a judgment *in rem* may be enforced as soon as the occupation of the sovereign state comes to an end. *The Broadmayne* [1916], P. 64; *Messicano* (1916), 32 T. L. R. 519; *The Crimdon* (1918), 35 T. L. R. 81. Compare *The Annette: The Dora* (1919), 88 L. J. P. 107, and see 18 MICH. L. REV. 531. The American decisions of this class have not reached uniform results. *The Attualita* (1916), 238 Fed. 909, was a ship requisitioned by the Italian government for commercial purposes, but manned by its owners. Arrest by process *in rem* for a tort was allowed, the foreign sovereign thus being effectively deprived of the use of the vessel. The facts in *Maru Nav. Co.* v. *Societa Commerciale Italiana Di Navigation* (1921), 271 Fed. 97, were essentially like those in the *Attualita.* The ship was attached in an action *in personam* against the real owner. See also *The Beaverton* (1919), 273 Fed. 539 (under charter of foreign sovereign). *The Roseric* (1918), 254 Fed. 154 (ship requisitioned by British government), is in conflict with the *Attualita.*

Three federal court decisions have dealt with the problem of the *Pesaro,* each holding that the ship of the foreign sovereign was immune from process *in rem,* even though engaged in a mere commercial venture. *The Maipo,* 252 Fed. 627; 259 Fed. 367 (tort); *Carlo Poma,* 259 Fed. 369.

One writer, at least, has taken the view that all property of a foreign sovereign, including his ships of war, should be liable in the courts of

another sovereign. BYNKERSHOEK, DE FORO LEGATORUM, *cap. iv,* OPERA MINORA, ed. 1752, p. 448. See MARTENS ON LAW OF NATIONS, Bk. 4, ch. 5, s. 9. Hall takes the opposite view. HALL'S INT. LAW [Ed. 7], p. 211. Numerous authorities are collected in 20 MICH. L. REV. 407, 413. Both English and American cases have long recognized certain exceptions to the general rule of immunity. If the sovereign commences suit a defensive counter-claim is permitted; and the sovereign can be made a party if it is for his benefit. *Strousberg* v. *Republic of Costa Rica,* 44 L. T. R. 199; *French Republic* v. *Island Nav. Co.,* 263 Fed. 410; *Rowan* v. *Sharps' Rifle Mfg. Co.,* 29 Conn. 282; *Id.,* 31 Conn. 1. See also *Manning* v. *Nicaragua,* 14 How. Pr. 517; *Molina* v. *Comision Reculadora Del Mercado De Henequen,* 104 A. 450.

The Italian courts were probably the first to recognize the distinction between acts of a foreign state of a sovereign nature and those of a private nature. The *Pesaro* would have been decided the same way in an Italian, Egyptian, or Belgian court. In the Belgian court, however, there would have been judgment but no attachment—the judgment becoming a debt against the foreign nation. The French writers express views favorable to the distinction of the *Pesaro,* regarding the acts of a sovereign state. But the French cases are still in accord with the English rule of the *Porto Alexandre* when a foreign sovereign is involved. JOURNAL OF THE SOCIETY OF COMPARATIVE LEGISLATION (1920), Series III, Vol. II, p. 258; THE AM. JOURNAL OF INT. LAW (1919), Vol. 13, p. 12 *et seq.* Our Supreme Court has never decided the question of jurisdiction in such a case, but it has said that the question of jurisdiction under such circumstances is "debatable," and "It is not plain that there is an absence of jurisdiction." *In re Hussein Lutfi Bey,* 41 Sup Ct. 609. Now that "nationalization is in the air," the importance of the decision which our Supreme Court may be called to make is apparent. It would be carrying a legal fiction too far if we were to say that the immunity "by implied license" reasoning of the *Exchange* is applicable to a case where the foreign sovereign has engaged in an ordinary commercial venture. The argument of "convenience" is all on the side of the *Pesaro,* and it is submitted that "regal dignity" cannot be made to suffer by such a rule. We may well expect to see the doctrine of the *Pesaro* upheld.

G. S.

THE KANSAS DECLARATORY JUDGMENT ACT IN OPERATION.—Statutes of Kansas authorized cities of the first class to carry out works of internal improvement and provide for payment of the cost thereof by issuing bonds of the city running no longer than ten years and bearing interest not exceeding five per cent. When conditions following the war made the marketing of five per cent bonds impossible at a price anywhere near par, the legislature enacted a new law authorizing the issuance of internal improvement bonds at six per cent interest, but requiring every such bond to contain a privilege of prepayment after five years from date.